IN THE

Supreme Court of the United States

OCTOBER TERM, 1908.

J. M. CEBALLOS & COMPANY, *Appellants,*
vs.
THE UNITED STATES.
} No. 108.

REPLY BRIEF FOR APPELLANTS.

AS TO THE ALLEGED LACK OF AMBIGUITY IN THE CONTRACT.

On pages 3 and 8 and on page 12 of its brief, the defendant states, as its principal point, that there is no ambiguity in the contract, and that, construction being unnecessary because the meaning is perfectly clear, the rules of construction referred to by the appellants are inapplicable.

On pages 6 and 7, the defendant admits the well-settled principles of construction for which the appellants contend in their principal brief, and admits that they would be applicable in the case at bar, if there

were, in fact, any ambiguity in the contract. The defendant simply denies the necessity for invoking these rules, saying:

> "We contend that no such ambiguity exists; that there is no necessity for going beyond the written agreement in order to interpret its meaning; that its provisions are clear; and the language used unambiguous and, under a reasonable construction, supports the judgment of the court below." (Defendant's Brief, p. 6.)

This present contention of the government is in conflict with the established facts and the obvious inferences from the lengthy opinion of the Court of Claims. The fact is, as stated in Finding XII (Rec., p. 33), that—

> "The *obligation* of this country to repatriate any other persons or classes of persons than those who were actually prisoners of war, or political prisoners, was *questioned* by the American Secretary of War.
>
> "On December 18, 1899, the Secretary of War addressed an official letter to the Attorney-General, stating that under the terms of the Treaty of Peace, the *obligation* of the United States to send to Spain at its own cost the wives and children of officers, and soldiers, and civil prisoners, designated as officials, and their wives and children was *not clearly defined*, and that *the rates of compensation* for the transportation of such persons were *not set forth in the contract*, but in that connection *the Secretary requested an opinion* as to the *construction* of the Treaty of Peace in regard to the scope of the description of Spanish prisoners, *whether* and to what extent the Treaty included the re-

> patriation of *non-combatants* at the cost of the United States. The Secretary further *requested a construction of the contract rate of compensation* which might be allowed and paid per capita for each class of prisoners charged for under the contract with Ceballos & Company. On January 6, 1900, the Attorney General answered this official communication of the Secretary of War and *construed the contract* substantially as follows," as in said finding set forth.

The opinion of the Attorney General referred to in this Finding is appended to the appellants' principal brief (at pages 73 to 82). In view of the questions of construction thus raised by Secretary Root, himself an eminent lawyer, and considered with such exhaustive elaboration by the Attorney General, it is hardly open to the government now, for the first time, to contend, as to this contract, "that its terms are clear and unequivocal and therefore necessitate no interpretation other than found therein." (Defendant's Brief, p. 8). We do not think it necessary to comment further on this afterthought of the government, which is so utterly at war with the whole previous record in the case.

Whatever may have been the attitude of the defendant from time to time with reference to the want of ambiguity and the necessity for construction, it is perfectly clear, from the generality of the military terms used in the contract by the military authorities who were its authors, that it has failed to express with particularity and precision the actual and full meaning of the parties—a meaning which can be made clear only by a reference to and complete knowledge of the surrounding circumstances and conditions.

As to the Allegation That the Contract Speaks for Itself.

The defendant thereupon indulges in the assumption that the "contract speaks for itself" (Defendant's Brief, p. 8), but, as we have just shown, the contract has not heretofore been regarded by the Government as speaking for itself, but has, on the contrary, been treated as one requiring the most careful consideration and construction in order to arrive at the intention of the parties and the extent of the Government's obligations and of the appellants' rights thereunder. Indeed, it is important to note that, in the consideration of the obligations of the United States under the treaty and the contract, Mr. Root, the Secretary of War, pointed out to the Attorney General, and the Attorney General conceded and stated that—

> "this is a case of importance, and, further, that the questions involved a construction of the Treaty of Paris, and the extent of the obligations resting upon the United States under that Treaty, and which, if decided one way, may become the subject of diplomatic discussion between this country and Spain." (23 Opinion Attorney General, pp. 10, 11, Appellants' Brief, p. 73.)

Regarding it as a case of such relative importance, the Attorney General then proceeded, at great length, to discuss the construction to be placed upon both the Treaty and the contract.

As we have shown in our principal brief, however, if the contract can be regarded as speaking for itself, it is evident that it does not speak the language which the defendant now claims to find therein. Instead of considering the contract as a whole, which it is, of

course, absolutely necessary to do in every case, the defendant contents itself with a reference to isolated provisions, and almost exclusively to the paragraph relating to compensation and a portion of the paragraph relating to accommodations. The defendant entirely omits all reference to the prior and defining portions of the agreement, which set forth the plan and purposes of the contracting parties, while the appellants, on the other hand, have considered the entire agreement in all its parts and have demonstrated not only that it is consistent throughout, but that its *terms* negative the government's contention to the effect that the contract only—

> "provides for the transportation of the two classes which were contemplated in the advertisement and proposals," and that, so far as compensation is concerned, the "entire body of persons to be transported were divided by the contract into two general classes: the first class, clearly set forth as commissioned officers, $215, and all other persons to be repatriated, whether they were enlisted men, private soldiers, or other persons designated by the Secretary of War for such transportation, may be designated as the second class of this general division, the second class to be transported for $73.75 each." (Defendant's brief, pages 11 to 12.)

On the contrary, as we have shown, the contract, after quoting the 5th and 6th Articles of the Treaty—the latter providing for the release and return to Spain of *"all persons* made prisoners of war by the American forces" (a provision absolutely omitted by the defendant in the analysis on page 18 of its brief)—divides the individuals to be transported into two classes

—not those described by the Government as the result of a disregard of the terms of the contract, but—

FIRST: *"Prisoners of War."*

SECOND: "AND *such other persons as may be designated by the Secretary of War."*

These are the words of the contract, repeated, by way of antithetical classification, four or five different times in its different paragraphs.

"Prisoners of war," as the *first* class, are themselves divided, in the paragraph of the agreement providing for accommodation, into "officers" and "enlisted men"; and, in the paragraph relating to compensation a similar division is made of the class into "each commissioned officer," on the one side, and "each enlisted man" or "private soldier" on the other. In each instance, the *second* contrasting class is always referred to as "such other persons as may be designated by the Secretary of War," or "other person designated by the Secretary of War for transportation." In the paragraph providing for the delivery, aboard ship, of the persons to be transported, the language is, "the prisoners of war *and* all other persons to be transported." In each instance, the contrast and antitheses are always between two classes alone, *"prisoners of war,"* on the one hand, and *"other persons designated by the Secretary of War,"* on the other.

As we have repeatedly shown in our principal brief, Finding IV of the Court below (Rec., p. 27) has conclusively fixed the status and classification of the *"wives and children"* in question here as *"prisoners of war."*

Therefore, these "wives and children," under the very terms of the contract, were to be transported as "prisoners of war," and their transportation was to be paid for accordingly. They were not and cannot by

any forced construction of this contract be placed in the class of "other persons designated by the Secretary of War."

As we have pointed out with such elaboration in our principal brief, the class, "prisoners of war," under the contract, was divided by the Secretary of War and the military men in the Quartermaster-General's office, who prepared this contract, into two general classes only--"officers" and "enlisted men." And it is the very *generality* of this rough-and-ready military subdivision of the general class "prisoners of war"—among which, beyond any possibility of dispute, these "wives and children" are classed by Finding IV—which forces upon us the question of construction now under debate, and which, as appears from Finding XII (Rec., p. 33), raised the doubt in the mind of Secretary Root as to whether "wives and children" could be carried, and as to whether any rate of compensation had been provided in the contract for their transportation.

The defendant has referred to "a labored effort to distract the mind from the plain and clear terms of this contract" (Defendant's Brief, p. 12), but we have failed to find, in our own argument, anything which can even suggest a comparison with the labored effort of the defendant to *avoid* a construction of the contract, in its *entirety*, and more particularly of the really vital provisions thereof.

As to the Cuban Contract.

The defendant next considers (Defendant's Brief, pages 12-17), the Cuban contract, the appellants' motion in respect thereto, and the general provisions thereof.

As to the appellants' motion, the defendant con-

tends (p. 13), first, that the *record* fails to show that the appellants made any request to the Court of Claims for the findings referred to in their motion.

On this point, it is sufficient to say, that the *present* practice, under the rules of this court, does not permit the appellant to incorporate in the record requests for findings made in the court below. This is an unfortunate omission in the rules. The course of justice, in the consideration of appeals from the Court of Claims, is seriously obstructed by the lack of any provision or procedure by which requests to find, and exceptions to refusals of that court to find such requests, may be carried into the record and brought to this court under the usual bill of exceptions.

In *United States* vs. *Adams,* 9 Wall., 661, the court had before it a motion precisely like that which the appellants have submitted in the case at bar with reference to the introduction of the Cuban contract. Mr. Justice BRADLEY, in writing for the court and recommending the granting of the motion, pointed out that requests to find, followed by exceptions to the court's refusal to find such requests, ought to be provided for in the Court of Claims as a proper procedure, and that such a course might properly be prescribed by rules. Thereupon, and growing out of that decision, the fourth and fifth rules of this court, with reference to appeals to the Court of Claims, were formulated. (See 9 Wall., VII).

These rules and their history were again made the subject of comment by this court, speaking by Mr. Justice MILLER, in *Mahan* vs. *United States,* 14 Wall., 109-112. Unfortunately, however, in the revisions through which the rules of this court have passed, this Rule V, providing for such requests, refusals and exceptions, has been emasculated by the complete omis-

sion of that portion of the rule relating to such requests, refusals and exceptions in the record. In view of the comments of Mr. Justice BRADLEY upon the desirability and necessity for such a procedure in bringing questions before this court, we must assume that this omission of that provision, formulated and incorporated in the practice by him with such study and care, was wholly unintentional. However that may be, the provision no longer existing, we were forced to adopt the practice originally sanctioned, prior to the rule, in *United States* vs. *Adams, supra,* and, accordingly, made the pending motion for instructions to the Court of Claims to incorporate these additional findings as to the Cuban contract.

The court will see, however, that, under the existing practice, there was no possibility of making it appear in this record, as the defendant contends that we should have done, that the appellants in fact made a request to the court below for such findings.

For the same reason, the defendant's second contention (p. 13) that the "*record*" fails to show that the appellants filed any motion for a new trial, or made any application for amendments to findings, or additional findings, in the court below, is without force or significance.

The defendant's third contention (p. 13), that the appellants were lacking in due diligence in filing the motion, is of no special importance. The motion was made five or six weeks ago, long before the case appeared upon the day call, and the defendant had our principal brief six weeks ago, so that it cannot be contended or assumed that the defendant has been taken by surprise or has suffered any prejudice. As a matter of fact, due diligence on the part of the appellants required, for the convenience of the court and the par-

ties, that the motion should be presented in close connection with the argument of the case and its appearance upon the day call, in view of the bearing of the motion upon the merits.

The defendant's final contention (p. 13) that the additional findings with reference to the Cuban contract are immaterial, raises the only question which need be seriously discussed in this behalf.

Apart from what we have said in our principal brief on this last point, it is sufficient to say that the Cuban contract is simply a part of the same general transaction and subject-matter with the Philippines contract, that is to say, they both relate to the one transaction described in the treaty as the "return to Spain," from Cuba and the Philippines, of "all persons made prisoners of war by the American forces." That was the transaction. As we said in our principal brief, it merely happened that three contracts were required, all being between the same parties (the appellants and the defendant) and relating to this same subject-matter. The Cuban contract bore date July 21, 1898, the Philippines oral contract was put in operation November 7, 1898, and the Philippines written contract bore date March 4, 1899.

Under both the Cuban contract and the Philippines oral contract these "wives and children" were in fact carried in the cabins with their husbands and fathers without any question whatsoever as to the propriety of such accommodation.

Under the Cuban contract, equally without question, the defendant *paid* for such transportation of such "wives and children," in the cabins, with their husbands and fathers, at first class rates.

The "wives and children" of officers were thus carried in the cabins, under the Philippines oral contract,

in accordance with the practice established under the Cuban contract, merely upon a request from General Otis that he be permitted to send back to Spain, as desired by the Spanish general, all sick "Spanish *officers and soldiers*" (Finding V, p. 27), the "wives and children" of such "Spanish officers" thus being, in actual practice, classed with such officers in respect to accommodation.. The same practice was, of course, followed under the Philippines written contract.

On the question as to the amount of compensation to be paid for such accommodation furnished to these "wives and children" under this practice of the parties, under the Cuban and under both of the Philippines agreements, it is at once seen that the practical construction placed by both parties on the Cuban contract, in this respect, becomes vitally important, because, as we have said, under that contract the defendant in fact *paid* for these "wives and children," carried in the cabins, the first class rate required for cabin accommodation.

The defendant (Defendant's Brief, p. 15) refers to the propriety of this construction given to the Cuban contract. On that point there can be no debate in this court. It is not a question of proper construction. It is a question of the *actual practice and action* of the parties under that contract, with which we solely have to do.

We distinctly protest against the attempt of the defendant (Defendant's Brief, pages 15-16) to make it appear to this court that there were any "defects" in the Cuban contract, or any "question," for which, in the light of "experience," either Secretary Alger or any other government official wished to provide a remedy by changes in the similar provisions of the subsequent Philippines contract. There is no proof whatever that,

from the beginning to the end of the performance of the obligations created by the Cuban contract, any demand was made by the one side which was questioned by the other, or that any question, doubt or uncertainty arose as to the respective rights and obligations of the parties. On the contrary, as it is a matter of record, it cannot be denied that, without raising any question whatever, the defendant paid for the cabin transportation of officers "wives and children" at the first class cabin rates.

This attempt of the defendant in its brief to assert, by inference, that there was this doubt or defect to be cured in the subsequent Philippines contract is simply made the foundation for the further baseless assertion that in the written Philippines contract, for the purpose of curing such alleged defect and in order to cover and include such "wives and children," there was added to the classes of persons to be transported in the *steerage* these "other persons designated by the Secretary of War," meaning thereby, as the defendant claims, the "wives and children" of officers and other passengers actually carried in the cabin. It is true that this latter class of persons was not in specific terms provided for in the Cuban contract, and for the reasons, doubtless, which we have explained at large in our principal brief, that is to say, that conditions in the Philippines demanded provision for the transportation of disaffected and dangerous Spaniards, possibly not to be classed strictly as "prisoners of war"—a class of persons, as the court judicially knows, which did not exist in Cuba. There was no such disaffection in Cuba, and there was no such harmful Spanish element to be got rid of.

This Cuban contract and the action of the defendant thereunder, in paying for these "wives and children" of officers, are all matters of record in the War De-

partment. These facts were all used by the Government and by the appellants in the course of their arguments in the court below, and are, in fact, incorporated in the printed briefs and requests for findings filed in that court. We had, therefore, supposed that the defendant would permit, as a matter of course, and would not object to, the incorporation of these facts in this record.

AS TO THE ALLEGED PRIMARY OBLIGATION OF THE UNITED STATES TO REPATRIATE ONLY "SPANISH SOLDIERS" OR COMBATANTS AS DISTINGUISHED FROM NONCOMBATANTS.

On pages 17 to 19 of their brief, the defendant contends that the "primary obligation," if not the exclusive obligation of the United States, under the treaty as well as the contract, was to repatriate Spanish soldiers only, and not mere noncombatants. In other words, the provision of the treaty, concerning *"all persons* made prisoners of war by the American forces," is ignored. Indeed, it is to be observed that the defendant, at this point, *deliberately omits* all reference to this last class of persons mentioned in this clause of Article VI of the treaty—a clause which, for present purposes, is the most material and pertinent in the whole treaty.

The defendant's whole contention is based upon the fact that Article V refers to the return of "Spanish soldiers," and happens, as a mere matter of orderly sequence, to precede Article VI, the more material portion of which the defendant thus disregards. This extraordinary proposition, which would limit the "primary obligation" of the United States, if not its sole obligation, to the return of combatants, was most con-

clusively negatived by the learned Attorney-General, in the course of many pages of his elaborately considered opinion (23 Opinion Attorney-General, pp. 10-17, Appellant's Brief, pp. 73-81), and by the Court of Claims.

The Court of Claims said with much emphasis (Rec., p. 46):

> "*Undoubtedly* both parties to the agreement expected the repatriation to include *every person on the islands whom the United States regarded as prisoners of war.*"

The learned Attorney-General, after quoting both Articles V and VI of the treaty, said (Appellants' Brief, p. 76):

> "Here are two classes of persons. The first are combatants, and *clearly* embrace *all combatants* who are here provided for. The second are *as clearly* persons *other than combatants,* and yet *all are 'prisoners of war,'* and are so described."

And again, referring to the Article VI of the treaty:

> "The fact that this provision is in an article separate and different from that providing for soldiers, and the change to a broader phraseology, *clearly express* a broader meaning, and *clearly show* an intention to embrace persons *other than combatants,* and to include *'all persons* made prisoners of war,' *whether combatants or not.* It also *clearly implies* that the term *'prisoners of war' was not intended to be restricted to actual combatants.*"

And again the learned Attorney-General further says (Appellants' Brief, p. 77):

> "Indeed, it is *quite clear* that the provisions of the treaty in this respect embrace *non-combatant prisoners as well as soldiers.*
>
> "This construction would be aided, if it were necessary, by the fact that it is *difficult to perceive why a distinction should be made* between different kinds of prisoners, based upon any real or supposed difference between a technical 'prisoner of war' and any other prisoner taken during war, and because of, on account of, and in the prosecution of, war; and is the more readily adopted because the United States can afford and is disposed to adopt a liberal construction."

And so we might say, in this particular case, that the construction for which these appellants contend, which is so clearly supported by the very terms of the contract in question, should be "the more readily adopted, because the United States can afford, and is disposed, to adopt a liberal construction."

The Attorney-General finally concluded as follows (Appellants' Brief, p. 77):

> "I am, therefore, of the opinion that the Treaty of Paris contemplates and provides for the repatriation by the United States of *all prisoners* captured and held by it, or held and released by the insurgents—*soldiers or civilians, men, women and children*—and whether their detention was originally voluntary as to them or otherwise."

It will be remembered that thereupon the learned Attorney-General proceeded to say that the *contract* in the case at bar provided definitely for the transportation of wives and children and other civilians, and that the United States had adopted a liberal policy in executing the contract.

Surely, it is inconceivable that the United States, which has not appealed, can now reverse its position and ignore these utterances and admissions of the Attorney-General and the court below.

The error into which the Attorney-General fell was in failing to observe that the "wives and children" were treated as "prisoners of war," and that the "other persons designated by the Secretary of War" were an entirely different and contrasting class of persons. As between the appellants on the one side and the Attorney-General, on the other, there is simply that single point open, that is to say, were the "wives and children" classed as "other persons designated by the Secretary of War," or were they classed as "prisoners of war"?

Finding IV (Rec., p. 27) conclusively affixes to "wives and children" the status of "prisoners of war." If that fact had been before the learned Attorney-General it is evident that he must have agreed with the appellants in holding that, as "prisoners of war," and not as "other persons," the "wives and children" must be carried with their husbands and fathers, and must be paid for accordingly.

It is, therefore, most unfortunate for the appellants that the defendant should have adopted a very liberal policy in the matter of repatriation, and, subsequently, a very niggardly policy in the matter of the compensation therefor.

It is impossible to avoid mention of the somewhat peculiar suggestion, now persistently made by the defendant in its brief (page 19), that "there was nothing to prevent an officer making provision on shipboard for his wife and children and paying the extra compensation if he so desired." So, too, there was nothing to prevent any other human being, private soldier, monk,

nurse, or lady pensioner, or any citizen of the United States or Spain, from paying such additional compensation for any passenger so carried. The defendant—apparently without any diffidence—likewise suggests (Brief, p. 19)—

> "That the Spanish Government under its subsidy contract with the steamship company, paid the difference between the lower and higher rates for the transportation of the officers' 'wives and children,' thus recognizing its obligation in the premises, concerning which the United States had no part."

Here, again, the defendant ignores the question of its compensatory obligation under the terms of this contract. If the Spanish Government has chosen to pay to the steamship company, for the honor of the United States, what it conceived to be the compensation which the United States had agreed to pay, but which it had declined to pay, that certainly goes to the credit of the Spanish Government and entirely to the discredit of the United States. This is particularly so in view of the fact that the obligation assumed by the two Governments was mutual. No complaint is made that the Government of Spain did not return to the United States all persons released by the Spanish authorities in accordance with the terms of the treaty; nor is any complaint made that any one else was called upon to pay the obligation which Spain assumed in that matter; but now, when the United States has refused to pay its obligations for the return of the Spanish prisoners released by the United States authorities, it is claimed that the United States ought not to be forced to meet such obligations, because, forsooth, the Spanish Government, without any

obligation on its part, has paid what the United States agreed to pay.

Finally, on this point, inasmuch as the court below has found that these "wives and children" of officers were "prisoners of war" (Finding IV, Rec., p. 27), we find that that fact alone puts us in entire accord with the defendant, which concludes its argument on this point by declaring (Defendant's Brief, p. 19):

> "If appellants are correct in their contention, it necessarily follows that the 'wives and children' of officers must be considered as officers, and, therefore, 'prisoners of war.'"

They have been found to be "prisoners of war," as we have seen, and, in that event, the defendant apparently agrees with us, that they must, therefore, be "considered as officers," for the purposes of accommodation and compensation under the contract.

As to the Oral Philippines Contract.

The defendant (Brief, p. 20), as we have said, misconceives the argumentative use which we make of the Philippines oral agreement. We dwell upon that agreement, not as a precedent for the defendant's payment for these "wives and children" of officers at first class rates, but solely as conclusive evidence, through a continuous practical construction, of the intent and purpose of the parties that these "wives and children" of officers should be carried in the cabins with their husbands and fathers. As this was the practical construction, as well as the usage of the parties, under both the Cuban and the Philippines oral agreement, and as no change was made in that respect in

the Philippines written agreement, it continued to be their purpose and intent under that contract; and, inasmuch as that written contract contained no negative provision on this subject, it naturally follows that such cabin accommodation for such "wives and children" was to be paid for at cabin rates, because the unjust suggestion will hardly be made that the parties intended that these "wives and children" should be carried in the cabins and yet should be paid for only at steerage rates.

The fact that, when it came to the preparation of the Philippines written contract, the parties still continued to use the same general military terms "officers," on the one hand, and "enlisted men," on the other, is accounted for by two circumstances; first, that in view of the practical construction of the previous Cuban contract and of the Philippines oral contract, and of the usage of the parties thereunder, it had become unnecessary to make any change in those terms or any further particularization thereof, since the parties had accepted the construction that "wives and children" were to accompany their husbands and fathers, and the attention of the parties was not, accordingly, sharply drawn to this feature of the contract; and, secondly, that, in these closing days of the Spanish War, involving for many months thereafter the cleaning up of the debris of that war and the rearrangement and return of troops, the confusion and magnitude of the business in the War Department made it impossible to give to matters of detail of this kind that deliberate consideration which their importance would otherwise have demanded. Therefore, in the last analysis, we are thus confronted with the generality of these military terms, thus employed in these contracts by these military men of the Quartermaster-General's Office,

where the contract, through the original proposals, originated.

As illustrative of the same point, it must be borne in mind that the Government continuously delivered for transportation *"Civilian* officials," who were carried at cabin rates—$215—and yet they were no more to be regarded as "commissioned officers," as contradistinguished from "enlisted men," than were these "wives and children" of officers (See Rec., p. 37, Finding XVI). The weakness of the defendant's general contention is thus further demonstrated.

As to Defendant's Analysis of Appellants' Argument.

The defendant (on pages 21 and the following pages of its brief), while not pretending to follow the serious argument of the appellants, indulges in certain comments upon appellants' brief, which it is not necessary that we should follow. In its criticism of our classification, that is to say, that under the contract, following the treaty, the classes of persons who were to be carried were, first, *"prisoners of war,"* secondly, *"AND such other persons as may be designated by the Secretary of War"* (which, the court will remember, is the precise language of the contract employed in several of its principal clauses, including both the clause as to accommodation and the clause as to compensation), the defendant inquires (p. 23) as to where we find any mention of these "other persons designated by the Secretary of War," if they do not in fact include such persons as officers' "wives and children," civil officials and their families, civilians, priests, friars, nuns, nurses, sisters of charity, etc.

It would perhaps be sufficient for us to say that no question has ever been raised, as between the defendant

and the appellants, concerning the transportation, or the payment therefor, of *"such other persons as may be designated by the Secretary of War."* As to them, the appellants have never complained, and have been content to accept the classification of steerage rates. It naturally follows that the Court of Claims made no findings with reference to "such other persons," and could have made no such finding, since no question concerning them was before that court.

The defendant then makes the rash assertion (pages 23 and 24 of its brief) that "the record is as silent as the tomb concerning the repatriation of any such people" (p. 24), and that "none of the class mentioned are included therein." As we have said, it was not necessary that they should be grouped, because no distinct question was made as to such persons. It is also true that, in the view of the defendant, such persons were grouped with "enlisted men," paid for at steerage rates, and would naturally be found in that class. In framing the lists, therefore, the defendant, instead of adding "enlisted men and other persons," would naturally have simply added the words, "enlisted men," with whom these "other persons" were grouped. In the classification, however, in the schedule (Finding XVI, Rec., p. 37) the court will find a group of—

"78 civilians at $73.75.....$5,752.50."

Doubtless, many more such persons were grouped in the defendant's classification of "enlisted men," which, as we have said, in the defendant's view, so far as compensation was concerned, signified the same thing as "other persons." Certainly these "78 civilians at $73.75" could not have been classified under any other group prescribed by the contract except that of "such

other persons as may be designated by the Secretary of War," who were classed with "enlisted men" at steerage rates, and they were precisely the type of persons whom we have described in our brief as the riff-raff and flotsam and jetsam of Spain's population and the obnoxious persons and Spaniards of whom it was desired to rid the islands.

We fail to appreciate the force of the defendant's rhetorical facetiousness (Defendant's brief, pages 23 to 25) in the discussion of the appellants' serious and lawyer-like argument on this point.

On pages 24 and 25 of its brief the defendant suggests, as a fact, that there was and is no difference between the Spaniards in the Philippines and the Spaniards in Cuba, and that the appellants can derive no support from the argument based on the existence of a peculiarly dangerous and troublesome element in the Philippines. It is enough for us to say that, if there is any one historical fact better established than another, it is that the Spanish situation in the Philippines was wholly different from that in Cuba. In the first place, the Filipinos were a very different population from that of Cuba, and at once provided the United States with a hostile element and a hostile army to combat. In the second place, the Spanish element, long entrenched in the local and municipal governments of the islands, was distinctly different, in character and in its relation to the native population, from that found in Cuba. As the result, too, of the long Spanish occupation, there was an accumulation in the Philippines of many dangerous and undesirable elements. These are historical facts, and it would be a work of supererogation to comment further upon this suggestion of the defendant.

This objection which the defendant raises (Defen-

dant's Brief, pages 23-28) to the force and significance which the appellants attribute to the historical facts concerning the nature of the Spanish occupation and the character of the Spanish element in the Philippines, as surrounding circumstances calculated forcefully to aid the court in the construction of this contract, is quite in line with its objection to the introduction of the Cuban contract and the practice of the parties thereunder (all matters of record in the War Department), and indicates a carefully studied effort to exclude from the record and shut out from the court that light from surrounding circumstances which the court would ordinarily and naturally require in the interpretation of any such contract as that now in question.

On page 28, the defendant refers to the utterly immaterial finding by the Court of Claims (Rec., p. 32) to the effect that it does not appear that the United States assigned or designated cabin accommodations for officers' "wives and children," but that the evidence itself establishes that, when the "wives and children" went on board the plaintiff's vessels, the plaintiffs made no claim that the United States should pay for such "wives and children" at commissioned officers rates.

As to this, while we admit, as the defendant is so careful to state (Defendant's Brief 29), that we are absolutely at the mercy of the court below, for under the practice of this court, the finding is not "susceptible of change, variation, or obliteration," we have this to say on the subject: As we stated in our principal brief, the United States, like ourselves, is bound by the terms of this contract. Those terms do not require that the appellants should make any claim in respect to their compensation in any place other than "Washington, D. C." There, and there alone, are the

accounts to be presented and the payments to be made. (See, for instance, terms of Requisition, Rec., p. 36). The contract itself distinctly declares that the payments are to be made only upon evidence that the persons transported have been "delivered on shore in Spain." (Rec., p. 31.) Of course, therefore, it was not in order for the appellants to make any claim in the Philippines, under their contract in respect to the transportation of these "wives and children," or any other class of passengers. The appellants supposed that the defendant would conform to its contract obligations, and would pay for such persons thus carried in the cabins; and it was only at that prescribed time and place, and in the prescribed event, that the appellants could possibly learn that the defendant would refuse payment for such transportation. There was nobody in authority in the Philippines who could have responded to any claim which the appellants might have made at that time. Just as it would have been a "mere impertinence" (Appellants' Brief, p. 80), as the Attorney General has declared, for the appellants to have questioned the government's right to include any person whatsoever whom it tendered for transportation, so it would have been an equal impertinence, productice of delay, the possibility of which the Attorney General's opinion condemns, if the appellants would have undertaken to make and argue a claim on their part as to whether they should receive first class compensation for the "wives and children" carried in the cabins. It is inconceivable that any such claim could have been made in the Philippines. Certainly, no response on the part of the defendant could have been made there.

Then, too, it is quite immaterial that the United States did not expressly assign cabin accommodations

to these "wives and children." The contract itself provides that commissioned officers shall receive cabin accommodations. It also provides that "the prisoners of war, and all other persons to be transported shall be *delivered* by the United States on board the ships." (Rec., p. 31.) As set forth in Finding IV (Rec., p. 27) these "wives and children" were regarded and treated as "prisoners of war." The appellants, presumably, as well as the government, knew this fact, and, when the government tendered and delivered to the plaintiffs, for transportation, a large number of civil, naval, and military officers, and, accompanying them, the "wives and children" of such officers, and, when, indeed, the government specified, as it did in its requisitions for transportation made during the last fifteen shipments (see, for instance, Rec., p. 36) that "wives of officers and officials" and "children" were to be delivered for such transportation, we insist, as we did in our principal brief, that such tender and delivery and request, were in themselves the full equivalent of an express assignment of such "wives and children" to cabin accommodations with the officers, whom they accompanied, upon such delivery by the defendant aboard ship. It is inconceivable, in any civilized country, that the delivery and tender for transportation by governmental officers, acting under such a contract, of persons so circumstanced and travelling in such company, could receive any other significance than that which we attach thereto. When the defendant delivered such persons, in company with their husbands and fathers, it thereby, in effect, in terms demanded that they should receive accommodation with such officers, in the *cabins*, and, presumably, thereupon, *such* accommodation was to be paid for at the rates prescribed therefor. Certainly, *the burden was upon the defendant,* at

that time, and not upon the appellants, to speak out, and, if such persons were not to be carried where they naturally belonged, to insist that they should be carried in the steerage, or, in any event, at third class rates, if such was to be the defendant's contention.

As to the Appellants' Third Point, Concerning Recovery Upon a Quantum Meruit.

While, primarily, this is an action upon an express contract, as we stated in our principal brief, our third point supports the suggestion that, if need be, we may justify our recovery under a *quantum meruit*, in respect to the element of *compensation* to be paid for "wives and children." The defendant in its brief (pages 29 and 37-41) misconceives our position. The express contract is not ignored, even under the *quantum meruit* suggestion, but the minds of the parties, in that view, had not met upon the single question of the compensation to be paid. Everything else had been covered by the contract, except the compensation to be paid for these "wives and children," who were in fact carried in the cabins. We never depart from the express contract. The rule of compensation, prescribed by that contract for *cabin* accommodations, is conclusively applicable, under this point, to establish the reasonable compensation which, in this view, must be awarded for the transportation of these "wives and children." They were *in fact carried*, and nobody disputes the fact that *they had to be carried*. (See Attorney General's opinion and opinion of Court of Claims, Rec., pp. 46-47.) Compensation to the appellants at the cabin rate naturally follows, since there is nothing in the contract to negative that rate.

As to the Defendant's Criticisms Upon Appellants' Consideration of "Certain Unimportant and Immaterial Findings of the Court Below."

In our principal brief we have restrained ourselves within parliamentary limits in commenting upon the findings referred to. (See Defendant's Brief, pp. 30-31.) Whatever the provocation, it is not our purpose now to indulge in needless characterization. We must, however, even though the matter be utterly immaterial, comment upon the defendant's repeated references to statements, in the petition and elsewhere in the record, concerning the alleged *agency* of the appellants for the Spanish steamship line.

The defendant must have known that the Court of Claims itself, as the result of a consideration of the evidence, declared (Finding 1, Rec., p. 26) in referring to the *former* agency of Ceballos & Company for the steamship company—for *New York traffic*—that—

> *"their agency ceased at the breaking out of hostilities between the two countries."*

And the court thereupon proceeded to find, "that the contracts hereinafter mentioned were made between the United States and Ceballos & Company *alone*." (Finding 1, Rec., p. 26).

We know nothing about the defendant's alleged "twilight zone of agency" (Defendant's Brief, p. 31), but we do know that, in view of these findings of fact, the defendant must have known that there was not the slightest justification or excuse even for a suggestion that Ceballos & Company were the agents of the steamship company, or that the contract was in any sense made by them as such agents. Whatever prejudicial significance the defendant hoped this court might at-

tach to these inexcusable perversions of the record (on pages 30-31 of the defendant's brief), is certainly made impossible by this reference to the facts themselves.

As to the contention of the court below and of the defendant (pp. 31-32, Rec., pp. 46-47), that an allowance to the appellants would be paying for what Spain has already paid under her contractual relations with the Spanish Steamship Company, we fail to follow either that court or the defendant. The suggestion seems to be utterly immaterial, in any event, and especially in view of the fact that we are here dealing with an express contract.

As to the suggestion that our contention as to cabin rates for children, for instance, would involve charging full rates for such children, it is to be said that it is certainly true that, if such children are to be carried in the steerage at third class rates, as the defendant insists, they are also paying a *full* rate, even though it be third class. This is the established fact, and this is the *full rate* for children which both the Attorney General and the Court of Claims have insisted upon. Logically, there can be no difference, in point of principle, between a full first class rate and a full third class rate, for such children.

We have already commented upon the immateriality of the finding of the court in respect to these payments by the Spanish Government. Whatever Spain has seen fit to pay for the honor of the United States, and in fulfillment of its obligations under the treaty, can have nothing whatever to do with the extent of those obligations and with the construction which the court should give to the contract embodying them.

On this question of rates, it is important to bear in mind that, while, as both the Attorney General and the Court of Claims admit (Rec., p. 46; Appellant's Brief,

p. 82), the contract provides for only two rates, no half-rates being created for children, the court must know, that the rates for this particular transportation were in the nature of wholesale or reduced rates, which, in accordance with the general and well known course of business the world over, *never include half-rates*. Reduced or wholesale rates of transportation never permit such half rates. It is, therefore, natural that this contract should not have provided for any reduced rates for children. The rate itself, for this long voyage through the tropics, was so remarkably low as to give little, if any, net return to either the appellants or the steamship company. Of this, the court may take judicial notice.

The court below also points to the immaterial fact that other passengers were carried, in addition to prisoners. The court in this connection, will not forget that the steamship company was at liberty to use all of its *second* class accommodations, for the United States contracted for only the first and third class passages, and, further, that for the last fifteen shipments the defendant furnished only 1,971 persons for transportation (Rec., pp. 34-35, Finding XV), thus leaving ample space for other passengers.

As to Appellant's Fourth Assignment of Error, Concerning the Claim for 198 Persons Actually Carried.

As to this claim, the defendant is forced to admit (pages 33-37), that, in order to sustain its contention and objection, it must claim, and thereupon ask to *disregard, the plain finding* of the court below (Finding 15, Rec., pp. 34-37), on the allegation that this finding contains a so-called "*slight error*" (Defendant's Brief,

pp. 33 and 36), or as otherwise expressed with reference to the list of persons contained in that finding—on the ground, "that this list *erroneously* contains the 198 passengers."

In view of the conclusive nature here of an ordinary finding in the Court of Claims, which, as the defendant itself states (Defendant's Brief, p. 29), "under the practice of this court is not susceptible of change, variation, or obliteration," we may safely leave the defendant's argument to answer itself.

If there be any "slight error" in this Finding XV, or if there be any conflicting statements in that finding, upon which the defendant seems to dwell in its attempt to demonstrate the "slight error" to which it refers, that construction of the finding must be adopted which will be *most favorable to the appellants*, as the defeated party below coming now before this court in support of its appeal. This is the well-settled rule applicable to the consideration of appeals based upon Findings of Fact made by an inferior court. In other words, all conflicting or doubtful provisions must be resolved in favor of the appealing party.

Bailey's New Trials & Appeals (2nd Ed.), p. 357 and cases there cited.

The defendant's argument, based upon this alleged error has been sufficiently answered in our principal brief on this point.

AS TO THE JURISDICTION OF THE COURT OF CLAIMS.

We cannot follow the defendant's suggestion (Defendant's brief, p. 41) as to a possible want of jurisdiction in the Court of Claims. This action is upon *contract*, and has *nothing whatever to do with the*

treaty, which is *merely referred to as illustrative of the scope of the obligations*, which the United States had assumed towards Spain, and which it naturally undertook to fulfil through the medium of the contracts in question. In other words, as the Attorney-General points out with such exhaustive argument, these appellants, in their relation with the defendant, were bound, merely by the terms of their *contract*, to carry whomsoever the defendant tendered, and were not in any way concerned with the scope or meaning of the treaty. In short, the appellants' claim for compensation does not grow out of, and cannot be made to depend upon, any of the treaty stipulations between the United States and Spain. This question has been fully considered by this court and decided adversely to the defendant's contention.

U. S. vs. Weld, 127 U. S., pp. 51, 57.

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